

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO.6459 OF 1985

WITH

SPECIAL CIVIL APPLICATIONS NO.6463 OF 1985,

107 OF 1986, & 109 OF 1986

For Approval and Signature

The Hon'ble Mr. Justice S.K. KESHOTE

1. Whether reporters of local papers may be allowed to see the judgment ?
2. To be referred to the reporters or not ?
3. Whether their lordships wish to see the fair copy of the judgment ?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder ?
5. Whether it is to be circulated to the Civil Judge?

G.C. UPADHYAY & ORS.

VERSUS

STATE OF GUJARAT & ORS.

Appearance:

(In All Sp.C.A.s)

MR SR BRAHMBHATT for Petitioners

MR PG DESAI for Respondents

Coram: S.K. Keshote,J

Date of decision: 20/10/1997

C.A.V. JUDGMENT

#. In all these four matters common facts and grounds have been raised and as such are taken up for hearing together and are being disposed of by this common order.

#. Special Civil Application No.6459 of 1985:

The petitioner, an Assistant in Gujarat Public Service Commission ('GPSC' for short), filed this Special Civil Application before this Court and prayer has been made for declaration of the action of the respondents authorities in allocating him to GPSC, to be arbitrary and illegal. Further prayer has been made for quashing and setting aside of the same. It is next prayed to declare that he is entitled to repatriation to Sachivalaya from GPSC and to his proper placement in the seniority list of persons of the batch of the petitioner and for further directions to the authorities to put him at his place above his juniors in the seniority list.

#. The GPSC, on requisition being sent by the Government, held combined examinations for selection on the posts of Assistants, Sales Tax Inspectors and Deputy Mamlatdars in the year 1980. The petitioner has applied for the post and he opted for the post of Assistant. Selection list was prepared as per the merits of candidates and therein the name of petitioner has been placed at Sr.No.113 in the waiting list for Assistant. The petitioner was called upon to join the training for the post to start at Sardar Patel Institute of Administrative Reforms from 2.6.82. The petitioner had undergone said training and after completion thereof, with effect from 20th July 1982, came to be allocated to Social Welfare Department of the Secretariat. Under the letter dated 1st December 1982, the petitioner came to be allocated to the GPSC. He was appointed in GPSC under the order dated 14th February 1983, on his relieving from Social Welfare Department on 9.2.83. After his appointment in GPSC, the petitioner started to make inquiries as to whether his seniority is to be counted in Sachivalaya and whether he has to be repatriated to Sachivalaya. The petitioner made a representation in this respect on 8th April 1983 to the Secretary, GAD, wherein he made a grievance that he came to be allocated to GPSC without his consent or option or willingness and

if he is permanently kept in GPSC, he would not have much promotional changes and if his seniority is maintained in Sachivalaya, he would get the benefit of combined seniority and if his seniority was not to be maintained at Sachivalaya, he should be sent back to Sachivalaya. That letter of the petitioner was not replied. Alongwith several other persons, the petitioner made a representation on 21st October 1983 to the Secretary, GAD and in this representation it has been mentioned that if the Government did not want to take any decision about repatriation of persons working in GPSC, they would like to have a meeting with the Hon'ble Chief Minister and if that is not possible, they might have to move the High Court. This representation of petitioner and other persons was also not replied. Reference has been made by the petitioner to the letter dated 19th September 1981 of the Section Officer of GPSC stating therein that the Government had considered the question of repatriation of persons working in other Departments to Sachivalaya and had desired all such persons who want to come back to Sachivalaya to make representations and such representations would be considered by the Government. So as per the case of petitioner, the Government has, as back as in 1981, taken a decision to take back all persons who were allocated to other Departments if they were not happy in those Departments. The petitioner submitted that it is not rule that once allocation is made, it is final and no person can go back from allocated Department to Sachivalaya. There are various instances, the petitioner urged in Special Civil Application, even in GPSC, that persons have been repatriated back to Sachivalaya. So there is no valid reason not to repatriate the petitioner to Sachivalaya. The petitioner had not given any consent nor had exercised any option to work in GPSC and as such, against his desire, he cannot be made to work in GPSC for all of his service tenure. The seniority list in Sachivalaya and GPSC is separately maintained and as such, though promotional chances in Sachivalaya are manifold and one can aspire even to the post of Secretary whereas in GPSC the highest post is that of Deputy Secretary which is equivalent to the post of Under Secretary in Sachivalaya. The petitioner's grievance is that in case he continues in GPSC, at the most he can go up to the post of Deputy Secretary which is equivalent to the post of Under Secretary in Sachivalaya. The allocation of employees in different Departments should have been based on some rational basis and in the case of petitioner, allocation has been made in most discriminatory and arbitrary manner. Further grievance of the petitioner is that the persons working at Gandhinagar are being given quarters

and such quarters are easily available at Gandhinagar whereas for others, who are working outside Gandhinagar, it is very difficult to get quarters and this results into paying heavy rents etc. which would be financial loss to the persons not working in Gandhinagar. The persons who are lower in the merit list prepared by GPSC are working at Gandhinagar and are getting quarter facilities. It is further submitted that the persons staying at Gandhinagar and working there are getting more CLA than the persons who are working in GPSC at Ahmedabad. Not only this, the petitioner has come to know that Government is contemplating giving of loans to the persons serving in Sachivalaya so that they can construct their houses there. So what the petitioner stated is that these additional benefits which the persons who are lower in merit than him are getting even today and would get in near future which are not available to him. Hence this Special Civil Application before this Court.

#. Special Civil Application No.6463 of 1985:

In this case also, writ petition is filed by petitioner who was allocated to GPSC and working on the post of Assistant. His grievances are identical to the grievances made by petitioner in Special Civil Application aforesaid. The petitioner, in this Special Civil Application, was selected in the same selection held by GPSC, in which the petitioner in earlier petition has been selected. The additional facts which have been stated in this Special Civil Application are to be taken note of. The petitioner has made a reference to the case of one N.K.Ambaliay, who was lower in merits in selection held by GPSC for the post of Assistant, who was also asked to work in GPSC and on his representation, repatriated to Sachivalaya. The petitioner has further given out that many other persons who were originally allocated to GPSC on the post of Assistants, on their representations, were sent back to Sachivalaya and reference in this respect has been made to the seniority list of Assistants in Sachivalaya. The petitioner claimed identical relief as claimed by the petitioner in aforesaid case.

#. Special Civil Application No.107 of 1986:

The petitioner was selected for the post of Assistant in the examination held by GPSC in the year 1979. He was allocated to GPSC where he joined on 16th October 1979. As his allocation to GPSC was without his consent and without exercising any option, he made a request to the Special Secretary, GAD, Sachivalaya, on 27th November 1979 for his repatriation. Under the order dated 18th

October 1980, the petitioner came to be allocated to Secretariat and he was posted in Finance Department, where he joined on 1st November 1980, on his relieving from GPSC. The seniority list of Assistants working in Secretariat was published vide Notification dated 26th June 1984 in which, name of the petitioner was shown at Sr.No.1527. This placing of the petitioner in seniority list was made on the basis of date of joining of the Secretariat and not on the basis of his initial date of joining on the post of Assistant in GPSC. So as per the case of petitioner, his name should have been at Sr.No.1401 in the seniority list. The petitioner objected his placement at Sr.No.1527 in the seniority list vide his representation dated 7.7.84. Reference has been made to the case of candidate who was at Sr.No.44 in the select list published by GPSC in which the petitioner was placed at Sr.No.45. The name of former had been shown in the said seniority list of Assistants of the Secretariat at No.1401 and the petitioner claimed his placement in the said seniority list, immediately below that person. This request of the petitioner came to be rejected under the letter dated 14th March 1985. He made another representation on 10th April 1985 and reiterated his request for giving him seniority from the date of his initial appointment on the post of Assistant. In this letter, the petitioner made a reference to the cases of Shri V.K.Mehta and Shri B.R.Thakore who were his batchmates to the selection made by GPSC and who were brought back to Sachivalaya, were given seniority on the basis of original date of appointment and therefore the petitioner being similarly situated, claimed same treatment. Some other persons who were working in GPSC represented to the Government that they should also be repatriated back to Sachivalaya and out of them some filed Special Civil Application No.2287 of 1985 before this Court. The Government therefore decided to send back the petitioner and two other persons who were initially allocated to the GPSC and were repatriated later to Sachivalaya and accordingly passed an order on 11.12.85 reallocating the petitioner and two other persons to GPSC. Grievance has, therefore, been made that without any reason or justification they have been reallocated to GPSC. Further grievance has been made that those persons who have been transferred earlier to the petitioner from GPSC to Secretariat were retained and as such, it is a case of 'pick and choose'. Some other contentions have also been raised. Prayer has been made for setting aside the order sending the petitioner back to GPSC and further for assigning seniority at the appropriate place in the cadre of Assistants in Secretariat.

#. Special Civil Application No.109 of 1986:

The petitioner, in this case has also been came to be appointed on the post of Assistant on being selected by GPSC in the year 1979. He was allocated to GPSC where he joined on 15th October 1979. As he was allocated to GPSC without his consent and without exercising any option, he also made a representation for his transfer to Sachivalaya and his request came to be accepted under the order dated 20th March 1981 of the Government and he was allocated to Secretariat. In pursuance of the said order the petitioner had joined at the Secretariat on 31st March 1981. In the seniority list of Assistants of Sachivalaya dated 26th June 1984, the petitioner has been assigned seniority, on the basis of the date of joining at the Secretariat and he was placed at Sr.No.1521 in the said list. The petitioner's case is that his name should have been placed at Sr.No.1356, on the basis of his initial date of appointment in GPSC. The petitioner in this Special Civil Application also, as per the aforesaid Special Civil Application No.107 of 1986 made representations to the Government for assigning him the proper seniority which was turned down. Further, as in the above case, the petitioner was also, alongwith two others, sent back to GPSC vide order dated 11.12.85. The petitioner, in this case, has prayed for identical reliefs, as prayed for by petitioner in Special Civil Application No.107 of 1986.

#. On 9.1.86, Special Civil Applications No.107 of 1986 and 109 of 1986 have come up before this Court for admission. The Court has made order as under:

N.P.A. returnable on 17.1.86. Status-quo to be maintained in the meanwhile. Direct Service.

On 17th January 1986, both these petitions have been admitted and interim relief was ordered to be continued. In Special Civil Application No.107 of 1986, I found an order made on 5th February 1986, which reads as under:

Heard. Interim relief in terms of Para 17(g) granted till further orders. To be heard alongwith Spl.CA.No.2287/85, 6459/65 and 63/85 in the last week of July 1986.

#. So both these petitioners, there is no dispute, are working in Secretariat, on the post of Assistants, for all these years, may be in pursuance of the interim relief granted by this Court in their favour.

#. In one of the other two writ petitions, the learned counsel for the petitioners submitted that the petitioner therein has been allowed by this Court to appear for examination to be passed for promotion to the next higher post in the cadre of Assistants in the Sachivalaya.

##. The learned counsel for the petitioners contended that the Gujarat Secretariat Assistance, Deputy Mamlatdars and Sales Tax Inspectors Recruitment (Examination) Rules, 1979 (hereinafter referred to as 'Rules 1979') makes a provision for combined selection to the post of Assistants in all the Departments of Secretariat, Gujarat Legislature Assembly, Gujarat Public Service Commission and Gujarat Vigilance Commission, but as these are the separate posts like other posts, namely, Deputy Mamlatdars and Sales Tax Inspectors, the allotment of the candidates from the select list should have been made in the order of merits and preference given by them for the concerned service. Though these are four different departments so far as the post of Assistance is concerned but the Rules 1979 are misleading and they were treated to be only one Department and amongst the category of Assistants, no preference of the candidate has been taken for the service whereas for two other services for which combined recruitment has been made namely, Deputy Mamlatdar and Sales Tax Inspectors, preference has been taken. This act is clearly arbitrary on the part of respondents to allot the candidates who opted for Assistant irrespective of their merits and without taking their consent or option to any of the Departments out of the four aforesaid departments. It has next been contended that allocation of employees in the categories of Assistants has been made without there being any rational basis. Moreover, no sufficient guidelines have been provided by the Government for allotment of candidates who have opted for the post of Assistants in the four departments aforesaid. This action of respondents to allocate the candidates who opted for the post of Assistants in the four departments without any consent and in ignorance of their merits is wholly arbitrary, illegal as well as it makes a hostile discrimination. The learned counsel for the petitioners then urged that the two departments, namely GPSC and Secretariat are taken to be a common departments and there is an interchangeability of Assistants. When interchangeability is there, then on the transfer of candidates from GPSC to Secretariat or vice-versa, seniority has to be assigned with reference to the date of their initial appointment or with reference to the merit number in the select list. He further urged that when the post of Assistant was taken to be a common post

for all these four departments, then a combined seniority list should have been prepared so that there may not be any grievance of the placement of a candidate in either of the Departments. In the Secretariat, what the learned counsel for the petitioner contended there are much more future chances of promotion and better facilities in comparison to the posting in other three departments. However, other facilities may not be so important, the promotion is most important and if the combined seniority list is prepared and on the basis of same, promotions are given to the next higher post, then there may not be any difficulty to any of the candidates in their posting in any Department in respect of merits. Comparing these two Departments, Assistants can reach to the level of Secretary if he is works in Secretariat, whereas in the case of GPSC he can only reach up to the stage of Deputy Secretary which is the post equivalent to Under Secretary of Sachivalaya. Lastly the learned counsel for the petitioners contended that in two other Special Civil Applications, the petitioners therein have been transferred to the Secretariat and they worked there for years together and when some other persons have filed Special Civil Application before this Court for grievance of having a combined seniority list as well as interchangeability or transfer from GPSC to Secretariat, the impugned order of their transfers to GPSC have been made. It is wholly arbitrary and unjustified. The petitioners in those two cases raised voice for giving them seniority from the date of their appointment or in order of their merit number, but instead of giving them their due benefit of seniority, order has been made repatriating them to GPSC.

##. On the other hand, the learned counsel for respondents contended that these four departments are separate watertight Departments having their own service rules and there is no interchangeability. It has next been contended that the Legislative Assembly is constituted under the Constitution and similar is the case of GPSC. There is no interchangeability also. It is a different matter that some transfers are made from GPSC to Secretariat or vice-versa but there is no interchangeability as such as alleged by the petitioners. The learned counsel for respondents further urged that the petitioners have opted for the post of Assistants and accordingly it is for GAD to allocate them in any of the four Departments. This is a consistent policy followed by respondent-State for all these years not to take any preference for the Departments out of the four departments from Assistants. The transfer of two of the petitioners to the Secretariat from GPSC was illegal and

as such it has rightly been ordered for their repatriation to GPSC. Carrying this contention further, the learned counsel for the respondents submitted that when transfer from one department to other department is on request then there is an implied condition therein that it is on the loss of seniority. The claim of the petitioners in two petitions for giving them seniority with reference to their initial date of appointment or with reference to their merit number in the select list prepared by GPSC is without any substance.

##. I have given my thoughtful considerations to the submissions made by learned counsel for the parties.

##. Before advertiring to these contentions, I consider it to be appropriate to take out briefly the scheme and the underlying objects of the Rules 1979.

The Rules 1979 were framed under Article 309 of the Constitution. The preamble of these Rules speaks of Rules for regulating the method of examination for recruitment to the post of Gujarat Secretariat Assistants, Deputy Mamlatdars and Sales Tax Inspectors. Sub rule (a) of rule 2 defines "Commission" as GPSC and sub rule (b) of rule 2 defines "Government" as the Government of Gujarat. Sub rule (c) of rule 2 defines "Examination" as the combined competitive examination specified in rule 3. Sub rule (d) of rule 2 defines "Schedule" as the schedule appended to these rules and sub rule (e) of rule 2 defines "Schedules Posts" as the posts specified in Schedule-I. Rule 3 provides for holding combined competitive examination by the Commission for selection of candidates for recruitment to the Scheduled posts in the Departments/Offices specified in the Schedule III at Ahmedabad every year. However, there is a further provision that the examination may also be held at Rajkot and Vadodara or different places on fulfilling the conditions. Rule 5 says that every year the concerned Department of the Secretariat shall intimate to the General Administration Department not later than 30th April the requirements of new recruits for the different Scheduled posts for the next year commencing from the 1st April of the next year, with such particulars, if any, as the Government may, by general or special orders direct. The General Administration Department shall communicate such requirements together with its own requirements, if any, to the Commission before the end of June of that year. Rule 10 is another relevant provision which provides that the candidate who desires to compete for more than one of the Scheduled posts, may submit a single application for all such posts indicating clearly in his application in order of

preference the posts for which he wishes to be considered. (Emphasis provided). Rule 14 provides that a candidate applying for appearing at the examination for one or more of the Scheduled posts shall be required to pay an application fee for Rs.20/- alongwith application. Rule 15 of the Rules 1979 provides that the Commission shall arrange the names of the candidates seriatim according to the merit taking into consideration the aggregate marks obtained by each candidate in the examination and shall prepare a list of qualified candidates. Out of the qualified candidates, the Commission shall recommend the names of the candidates according to the requirement for the appointment to the unreserved vacant posts required to be filled in on the basis of the result of the examination. A proviso is there for inclusion of names of candidates belonging to the category for which the posts are reserved. This rule further contemplates for preparation of waiting list. Sub rule of Rule 15 says that result of the examination shall be divided into three parts as under:

Part I : The names of the candidates to be recommended to Government;

Part II : The names of the candidates to be kept on waiting list till the result of the next examination is published;

Part III: The names of the candidates who are not included in part I and II above;

The names of the candidates contained in parts I and II, shall be published in the Government Gazette. All the three parts of the result shall be displayed on the Notice Board of the Commission. The Commission will forward a copy of the result so published in the Government Gazette in the Government Administration Department. Rule 16 of the Rules 1979 lays that the allotment of candidates, selected for appointment to various Scheduled posts shall be made by General Administration Department having regard to the preference, if any, for any particular post, expressed by candidates, in their application for examination and the recommendation made by the Commission. Success in examination shall not, itself, confer any right to appointment and it shall be open to the appointing authority to pass over a candidate, if, after such enquiries as are considered necessary, it is satisfied that the candidate is not in all respects suitable for public service. In case a candidate declines to accept the offer of appointment to any post, his appointment

shall be cancelled and his name shall be removed from the list of selected candidates. Rule 17 provides that the appointment shall be made as and when vacancies occur in accordance with the provisions, if any, in the recruitment rules prescribed for the respective post. (Emphasis provided). Rest of the rules of Rules 1979 are not relevant and as such are not taken.

##. Schedule I of the Rules 1979 gives out the names of three posts, Assistants, Dy. Mamlatdars and Sales Tax Inspectors. So these are Scheduled posts as provided under sub rule (e) of rule 2. Schedule II relates to examination and it provides that written test for Assistants/ Deputy Mamlatdars/ Sales Tax Inspectors. So it is a combined examination with common syllabus. Schedule III is expansion of Schedule I. These three scheduled posts were divided as under:

(A) Assistants:

- (1) All Departments of the Secretariat.
- (2) Gujarat Legislature Secretariat.
- (3) Gujarat Public Service Commission.
- (4) Gujarat Vigilance Commission.

(B) Deputy Mamlatdars:

- (1) Collectorates under the Revenue Department.

(C) Sales Tax Inspector:

- (1) Sales Tax Department

##. The Rules 1979 start with the words, "Gujarat Secretariat Assistants, Deputy Mamlatdars and Sales Tax Inspectors Recruitment (Examination) Rules, 1979". So if we go by the plain reading of the title of the Rules aforesaid, what I find that it gives out an impression that these Rules are only relating to the three services, namely Assistants in the Secretariat, Deputy Mamlatdars and Sales Tax Inspectors. The Scheduled posts have been defined as posts specified in Schedule-I and if we go by Schedule-I, then what I find is that only three posts have been mentioned therein, namely, (i) Assistants, (ii) Deputy Mamlatdars, & (iii) Sales Tax Inspectors. The Schedule I gives a misleading picture as if the post of Assistants is only in different Departments of the Secretariat. However, Schedule III has to be referred wherein the Scheduled posts available in different

Departments have been mentioned. Against the post of Assistants, it has been given out that these posts are there in all Departments of Secretariat, Gujarat Legislature Secretariat, Gujarat Public Service Commission & Gujarat Vigilance Commission. I have taken the view in Special Civil Application No.2287 of 1987 decided on 20.6.1997 that the Secretariat, Gujarat Legislature Secretariat, Gujarat Public Service Commission and Gujarat Vigilance Commission are all separate Departments and though the name is common, the services of Assistants in the Secretariat, Gujarat Legislature Secretariat, Gujarat Public Service Commission & Gujarat Vigilance Commission are altogether distinct, different and separate. The pay scale is also identical but merely because the name and the pay scales are identical, it cannot be said that the posts of Assistants in these four Departments are of one and same service. In the Secretariat, there are different Departments, but all are under Secretariat. So these Rules are not clear and which has resulted in taking it to be a case of four different services to be one common service and as such, a candidate who opted for the post of Assistant was not required to give any option for the Departments, namely, Secretariat, Gujarat Legislature Secretariat, Gujarat Public Service Commission and Gujarat Vigilance Commission. During the course of arguments, the learned counsel for the respondents has shown to me the Form which was required to be filled in by the candidates intending to apply for the post of Assistants etc. in response to the advertisements as and when issued by Gujarat Public Service Commission for recruitment and therein the only thing which is mentioned is 'Assistants'. From this, the learned counsel for the petitioners wanted to make out a capital. In the advertisement though it has been notified that the combined competitive examinations to be held for recruitment of Assistants in Departments of Secretariat, Gujarat Legislature Secretariat, Gujarat Public Service Commission and Gujarat Vigilance Commission, Sales Tax Inspectors in the Sales Tax Department, and Deputy Mamlatdars in Collectorates under the Revenue Department etc., but the Scheduled posts are only three posts, i.e. Assistants, Deputy Mamlatdars and Sales Tax Inspectors. Rule 10 of the Rules 1979, has to be refer again here. It is provided therein that a candidate who desires to compete for more than one of the Scheduled posts, may submit a single application for all such posts indicating clearly in his application in order of preference the posts for which he wishes to be considered. A plain reading of this Rule gives incorrect information to the candidates. They have to indicate in their application,

in order of preference, the posts for which they wish to be considered and the posts means Scheduled posts and Scheduled posts means the posts specified in Schedule-I and in Schedule-I, as stated earlier, the post of Assistants, as a whole, of all the four Departments has been taken. In Schdeule-I it is not mentioned as Assistants in all the Departments of Secretariat, Assistants in Gujarat Legislature Secretariat, Assistants in Gujarat Public Service Commission and Assistants in Gujarat Vigilance Commission. So a candidate is to give option whether, in order of preference, he wishes to be considered, for the post of Assistant, or Deputy Mamlatdar or Sales Tax Inspector. The Rules 1979 nowhere indicate that the candidates have to give option for four Departments, for the post of Assistants', where such posts were existing. The Rule making authority, while framing these Rules, has not taken into consideration this distinction and Rules have been framed as if they only relate to Assistants, Deputy Mamlatdars and Sales Tax Inspectors. If this distinction would have been made clearly, then the candidates would have been required to give preference for $4 + 1 + 1 = 6$ posts. But when four posts of Assistants in different Departments have been clubbed together, this confusion has been created and has resulted in this litigation. It is not the case where preference is not called for, for different posts, but amongst the Assistants of different Departments, this has not been specifically provided and as such, the petitioners are perfectly justified to say that the General Administrative Department has taken a sole role to be exercised by it, to post the applicants who have opted for Assistants irrespective of their merit in either of the four Departments. If we go by Rule 16 of the Rules 1979, the Rule making authority provided that the allotment of candidates, selected for appointment to various Scheduled posts shall be made by the General Administrative Department having regard to the preference, if any, for any particular post, expressed by candidates, in their application for examination and the recommendation made by the Commission. Once again, the preference is restricted to Scheduled posts. The Rule making authority has taken the post of Assistants in four separate Departments to be common. As a result, though these are all separate Departments having separate posts/service, though with common name and pay scale like other Departments, i.e. Sales Tax and Revenue Departments, but because of Rules 1979 and in particular Schedule-I, preference has only been restricted to the Scheduled posts, and the selected candidates were allotted in total ignorance of their merits, by General Administration Department, to different Departments.

When these are four separate services, though with common name of the post and common pay scale, the same should have been put at par with the posts of Deputy Mamlatdar and Sales Tax Inspector and Rules 10 and 16 of the Rules 1979 should have given necessary indication in this respect. These posts are not interchangeable. These four Departments are having their own separate seniority lists and channel of promotion. None of the service Rules of these four Departments regulating recruitment and other service conditions of the Assistants permit any interchangeability from one Department to other Department. When these four Departments are watertight Departments then the grievance of the petitioners that they were not asked to give their preference for appointment in a particular Department on the post of Assistants is certainly of substantial nature.

##. It is true that even if a candidate gives preference or option for a particular Department for the post of Assistant therein, he may or may not get appointment in the Department concerned. But from the scheme of Rules 1979, it is clear that a candidate has a right to give option for the appointment to the scheduled posts. So far as other schedules posts are concerned, there is nothing wrong, but the dispute is only to the post of Assistants. When the post of Assistants are there in four Departments which are water-tight compartments, the Rules are absolutely silent as to why, to this class of persons who opt for post of Assistants, preference cannot be taken for Departments. Admittedly, the post of Assistants with common name and pay scale are there in four separate Departments and as held earlier, these are four separate services, but this position in the Rules 1979 remains unexplained. From the reading of the title of the Rules 1979 as well as Schedule I, the post of Assistants was taken to be a common post in the four Departments as if it is a common service in four Departments, which is not correct. In the Rules 1979, with reference to the different posts in different Departments, a provision for giving of the preferences by the candidates for services is made and as such not giving any right to the candidates who opt for the post of Assistants, seems to be on the fact of it unreasonable. It is a different matter that the candidates are not given any right of preference for the services/posts but once the Rule making authority accepted and confirmed a right to the candidates to give preference for the scheduled posts, then it should have been given to all candidates. When the said post is with common name and the pay scale in four Departments, then the candidates should have an option to give their

preference for the Departments. That precisely has not been done under the Rules 1979. It appears that the Rule making authority has taken the post of Assistants to be in separate Departments of the Secretariat and further it appears to have forgotten that this post is also there in three other Departments which are not the Departments of the Secretariat. So there appears to be some lacunae in the Rules 1979, and that lacunae results in serious grievance or case of discrimination amongst the persons similarly situated. If the Revenue Department and Sales Tax Department are taken to be separate Departments, then all the four Departments, namely, Secretariat, GPSC, Gujarat Legislative Assembly and Vigilance Department, should have been taken to be separate Departments, which in fact they are, for the purpose of option of preference to the post of Assistants. This option was given under the Rules framed under Article 309 of the Constitution. I consider it to be advantageous here to make reference to the latest decision of the Hon'ble Supreme Court in the case of State of Bihar v. Kumar Promod Narain Singh & Ors., reported in (1997)5 SCC 298. There the option of preference for the services of the post were not given under some statutory Rule. However, Their Lordships, Supreme Court, have held that a candidate has no right to give option to indicate the post for which he would like to be considered or even if the options were called for, it is not mandatory for the Government to accept options by the candidates and make appointment on the post or calling of the options of the candidates is only discretionary and the Government is not bound to select the candidates on the basis thereof or the candidates do not acquire any right by exercise of options but the Government has to prescribe objective and rational method of allotment of the candidates to various Departments depending upon their job necessity and requirement. In the case before their Lordships of Supreme Court, while making the appointments, objective and rational criteria were not followed. In the present case, as stated earlier, the Rules 1979 makes a provision for calling of the options of the candidates for the scheduled posts, but even if we take it that the Assistants may not have any right to claim to give option or preferences for the post of Assistant in different Departments, still a larger question that arises is that for allocation of Assistants to different Departments, has the Government prescribed any objective and rational method of allotment of the candidates, however, depending upon their job necessity and requirement ? In the present case, the petitioners have made grievance that by adopting the method of "pick and choose", the allotments of candidates on the post of Assistants in different Departments have

been made by respondent-State. On the record of these Special Civil Applications, the respondents have not produced anything to show that they have prescribed an objective and rational method of allotment of the candidates to the post of Assistants in various Departments. In the reply, the respondents have admitted that no option or consent of the candidates to opt for the post of Assistants have been taken for their allocation in different Departments. It has further been given out that the candidates who are to be appointed as Assistants in various Departments of the Secretariat, Gujarat Legislature Secretariat, GPSC, or Vigilance, are neither given option nor their consent is obtained for allotting them to the respective Departments. The question of giving of the option by candidates is contemplated by the Rules 1979 and particularly Rule 16 thereof. The option has to be given only for the scheduled posts and that has been done by the candidates. While making allotments of these candidates to different Departments, same should have been done on the basis of an objective and rational method. In the reply, the respondents have come up with the case that allotment of the candidates for the post of Assistants is made having regard to the availability of vacancies at one point of time. The allotment of the petitioners to GPSC was made as there were vacancies of Assistants in that office and as such the action of the Government in allocating the petitioners to the office of GPSC is stated to be not arbitrary. So far as the allotment of candidates on the basis of their merits and subject to the availability of the post in the Department is concerned, nobody can have any exception but from the facts of this case, on which there is no dispute, allotments have been made indiscriminately, i.e. a candidate of higher merit has been placed in GPSC whereas a candidate of lower merit has been appointed in the Secretariat. Not only this, a candidate who has been allotted to the Secretariat first, at later point of time, has been allotted to GPSC. Reference in this respect may have to the case of petitioners in Special Civil Application No.6459 of 1985. There are instances after instances that after allotment to the GPSC, many of the candidates have been transferred to Secretariat also. It is understandable that on availability of the post in a particular Department, allotment has been made but if at the same time the vacancies are available in different Departments, then the respondents are conspicuously silent how allotment have to be made. The respondents are further unable to explain why a candidate who has been allotted at one point of time to the Secretariat itself has been reallocated to GPSC. Taking into consideration the

totality of the facts of this case, I am satisfied that the grievances of the petitioners that allotments of the candidates have been made without prescribing any objective and rational method of allotment by the Government has substance. Even if under the rules, the provision has not been made for calling any option from the candidates who opt for the post of Assistants, for their appointment to a particular Department, still the respondent State is under legal obligation and more particularly, now, in view of the latest decision of the Apex Court in the case of State of Bihar v. Kumar Promod Narain Singh & Ors. (*supra*), to prescribe an objective and rational method of allotment of the candidates who have opted or given preference for the post of Assistants, to various Departments. In the present case, it is not the case that preference to this post were not called. The difficulty has arisen only when the post of Assistant was unfortunately taken to be, by the Rule making authority, a common post for four different Departments, which is factually and legally not correct.

##. The net result of this discussion is that though the grievance made by the petitioners in these petitions are of substantial nature, but what relief has to be granted in these matters to them is yet another aspect for consideration of this Court. The Rules 1979, as the stand, may not require the candidates to give their preference for the post of Assistants in different Departments, and as such, the respondents have also acted in accordance with the Rules and all the posts of Assistants in four Departments were taken together and appointment has been made from the merit list to the post of Assistants in different Departments. It is also not in dispute between the parties that a candidate who was higher in merit list has been allotted to Gujarat Public Service Commission whereas a candidate who was lower in merit list has been allotted to Secretariat or vice-versa. But that has happened only because for the post of Assistants, though they were in four separate Departments, preference was not taken or provided to be taken under the Rules 1979 and for the last more than eighteen years on the basis of this, all appointments have been made. The posts of Assistants in Gujarat Public Service Commission is not interchangeable with the posts of Assistants in Secretariat or other two Departments. Except in few cases where transfers have been made from Gujarat Public Service Commission to Secretariat, in all other Departments, these persons are working in the Department where they have been originally allotted, except in two petitions where the petitioners therein have been reallocated to the Secretariat, in one

case in 1979 and in another case, in 1981, and thereafter they were sought to be sent back to Gujarat Public Service Commission under the order dated 11.12.85, but this Court has stayed those orders and the petitioners in these two petitions, namely Special Civil Application No.107 of 1986 and 109 of 1986, are working for all these years, i.e. for about 18 years in one case and 16 years in another case, in the Secretariat. They should be allowed to continue in the Secretariat. The order dated 11th December 1985 to send these persons back to GPSC has been passed when they started to claim their seniority. This matter started in the year 1985 and after 12 years what actual grievance of the petitioners in these two petitions now survives regarding their seniority has not been made known to the Court by either of the parties. They are claiming their seniority with reference to the date of their initial appointment or on the basis of their merit number in the select list. There is semblance of justification in this claim, but it is made clear that in case because of seniority which has been given to them, they suffer any substantial injustice, then only this matter may be examined by respondents on making representations by petitioners in these two Special Civil Applications and they may be given seniority as per Rules by treating them to be initially appointed in the Secretariat. If nothing has been suffered by them because of seniority assigned to them, this exercise is not required to be undertaken. So far as the petitioners in other two petitions are concerned, they are working in GPSC and they have prayed for their transfer to the Secretariat, but this prayer at this stage cannot be granted as it will disturb the whole of the settled position. Moreover, these selections have been made as per the Rules and the petitioners therein have not made any grievance immediately. If we go by the facts of these two cases, then these two petitions have been filed by petitioners therein after long delay of three years of their appointments / selection, in one case and five years in another case. Taking into consideration the matter from any angle, no relief of the nature prayed for by these petitioners can be granted. In the result, Special Civil Applications No.6459 of 1985 and 6463 of 1985 are dismissed. Rule discharged. Interim relief, if any, granted by this Court, stands vacated. No order as to costs.

##. So far as Special Civil Applications No.107 of 1986 and 109 of 1986 are concerned, the orders impugned therein are quashed and set aside to the extent they relate to the petitioners in these two petitions and it is hereby ordered that the petitioners in these two

petitions may be continued in the Secretariat. So far as the claim of seniority is concerned, it is open for petitioners in these two petitions to make representations as observed in the earlier part of this judgment. The Special Civil Applications and Rule in respective petitions, i.e. Special Civil Application No.107 of 1986 and 109 of 1986 stand disposed of in aforesaid terms with no order as to costs.

##. Before parting with the judgment, I consider it to be necessary to bring this anomaly in the Rules and to draw attention of the Government to the latest pronouncement of the Hon'ble Supreme Court so that in future, there may not be a litigation of the present nature. The Rules 1979 makes a provision for calling of preference from the candidates for the scheduled posts, but while framing the rules, it appears that another important aspect has been left out of the consideration by the Rule making authority, viz., that the post of Assistants are there in four distinct and separate Departments which are water-tight compartments. The posts are not interchangeable and seniority, promotions etc. are altogether separate. In fact, these four are separate and distinct services and recruitment and service conditions thereof are regulated under different set of Rules framed under Article 309 of the Constitution or some other Article of the Constitution. Once the Rule making authority decides to confer a right to the candidate to give preference for scheduled posts, then this Court has failed to see any justification not to confer this right to the Assistants, with reference to the Departments. The Rule making authority appears to have been misled by the fact that in four Departments, the posts of Assistants exist with common name and pay scale, but that is not the real consideration. The post of an Assistant in the Secretariat is different from other Departments. Similarly, the post of Assistants in other three Departments are also distinct and separate. So the post of Assistants in the four Departments should have been taken, in the Rules 1979, to be a separate post, as the post of Deputy Mamlatdars, Sales Tax Inspectors, etc. and for the purpose of preference, this should have been declared to be scheduled post in four Departments. So there appears to be a lacunae or anomaly in the Rules and now it is for the Government to consider to fill up the same or to overcome the anomaly so that unavoidable litigation may not come before this Court. The other aspect is that if the preference is to be given only for the post of Assistant and not for Departments, then for the allotment of candidates to different Departments, namely, Secretariat, Gujarat Legislature

Secretariat, Gujarat Public Service Commission or Gujarat Vigilance Commission, the Government should prescribe an objective and rational method of allotment and it should be notified to the candidates also. A copy of this judgment be sent to the Chief Secretary, Government of Gujarat to examine the matter for making necessary amendment in the Rules 1979 or for laying down an objective and rational method of allotments of candidates who opt for the post of Assistant to different Departments, so that in future this type of litigation may not arise.

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(sunil)